proven it will not provide sufficient amounts of educational programming without more specific regulation by the government.

Furthermore, by definition, the FCC did not need to prescribe a quantity or particular type of educational program to be aired on non-commercial educational stations because "the very definition of the service ... make public broadcasting stations very different, in programming terms from their commercial counterparts."[50] To require public television stations to air an amount certain of educational programming simply restates the obvious--noncommercial stations exclusively provide "educational" programming during their broadcast hours.

Therefore, the language in Turner no way limits the FCC's authority to impose affirmative children's educational programming obligations on broadcasters. Under Red Lion, as reaffirmed in Turner, such obligations are subject to a test that balances the First Amendment rights of children, as viewers and listeners of broadcast television, with the First Amendment rights of broadcasters. As demonstrated in CME et al.'s Comments, adoption of these proposals strikes a reasonable balance between each of those interests.[51]

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[50] Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licensees, 98 FCC2d 746, 751 (1984).

[51] See 1995 Comments of CME et al. at 34 (finding that the FCC's proposals are constitutional under a balancing test and that even if strict scrutiny were applied to the proposals, they would be upheld because there is a compelling interest in increasing educational programming for children; and the FCC's proposals are narrowly tailored because broadcasters retain discretion to determine their programs' content, time, date,

2. The Supreme Court has upheld other affirmative content requirements

Smolla argues that the Supreme Court has never countenanced government regulations that impose specifically defined affirmative programming requirements on broadcasters. To the contrary, the First Amendment 'window' opened by Red Lion and its progeny has been limited to regulations aimed narrowly at ensuring a quality of access in public debate and limited channeling of indecent programming."[52] Smolla's distinction between "balance and access" cases (as Smolla dubs them) and those that impose specific affirmative requirements is wholly artificial.

In Red Lion Broadcasting, Co. v. FCC, 395 U.S. 367 (1969), the Supreme Court upheld the affirmative programming requirement that stations devote reasonable time to coverage of controversial issues of public importance, and that those issues be covered in a fair and balanced manner. It also upheld the requirement that stations that editorialize in favor of or in opposition to candidates provide other candidates with notice and reasonable opportunity to respond. Similarly, in CBS v. FCC, 453 U.S. 367 (1981), the Supreme Court found an affirmative, promptly enforceable right of reasonable access to the use of broadcast stations for individual candidates seeking federal elective

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and duration).

[52] Smolla at 8.

office.[53] Both requirements intrude on the editorial discretion of broadcasters by requiring them to devote time to particular, preordained types of programs in a timely fashion.

Moreover, the Communications Act of 1934 provides for another affirmative programming requirement that requires licensees that permit a political candidate to appear on their station to provide legally qualified candidates with equal opportunities.[54] Similarly, the FCC has the authority, in the public interest, to obligate licensees to provide issue responsive programming.[55] All of these provisions require broadcasters to air specific pre-ordained categories of content, over which they have little or no editorial discretion.

Even if a court were to accept Smolla's argument that "balance and access" cases were somehow different, and more constitutionally permissible than affirmative programming requirements, then children, like adults, should be ensured reasonable access to a balance of programming that includes educational fare. As Smolla explains, the rationale underlying the regulations upheld in Red Lion and its progeny is that they ensured "reasonable balance and access equity in the presentation of views on issues of public concern or the political

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[53] Id. at 376-386.

[54] See Branch v. FCC, 824 F.2d 37 (D.C. Cir. 1987)(upholding the equal opportunities provision of Section 315 of the Communications Act of 1934).

[55] Revisions of Programming, 98 FCC2d at 1078.

process."[56] These cases balanced the First Amendment rights of adults as viewers with broadcasters' rights. Because children are too young to vote and participate in the political process, adult "balance and access" cases are meaningless to them. Such programs are neither age appropriate, nor educational. Still, like adults, children are entitled to programming that will educate and inform them. Therefore, it is equally important that children have a balanced mix of programming opportunities, that includes educational and entertainment programming. Without regulation, children who have no economic or political power and little voice in the market can not advocate for more educational programming.

B. The FCC's Proposals Are Narrowly Tailored To Meet The Government's Substantial Interest In Increasing Educational Programming For Children

All Commenters in this proceeding agree that providing educational programming for children is a compelling government interest.[57] So the only remaining issue is whether the FCC's proposals are sufficiently tailored. Tailoring is primarily concerned with the extent to which a regulation intrudes on the editorial discretion of broadcasters. Adoption of the FCC's proposals is less intrusive than the requirement upheld by the Supreme Court in Red Lion. As previously discussed, the Fairness Doctrine requires stations who editorialize in favor of or opposition to candidates to provide other candidates with notice

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[56] Smolla at 9.

[57] Smolla at 24 and 36.

and reasonable opportunity to respond.[58] Similarly, it requires the fair and balanced coverage of controversial issues of public importance.[59] In practice, the breadth of broadcasters' editorial discretion is dependent on their selection of particular persons and content for broadcast. Once a licensee has supported or opposed a candidate or controversial issue, the obligations to provide an opportunity to respond arises. Conversely, the FCC's children's programming proposals are applied evenly and consistently across the board to all licensees. Individual licensee programming judgments in no way implicate additional programming responsibilities.

Likewise, as Commenters explained in their original Comments, the regulations upheld in the FCC's "balance and access" cases are also much more intrusive then the FCC's proposed regulations which merely require three hours a week of programming specifically designed to educate and inform children.[60]

In addition, the FCC's proposals are narrowly tailored because specific affirmative programming requirements will make the regulations interpreting the CTA self-executing. They will

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[58] Red Lion 395 U.S. at 375.

[59] Id. at 373-75.

[60] See 1995 Comments of CME et al. at 35-36 (finding adoption of a programming standard is less intrusive than the prohibition on editorializing struck in League of Women Voters, 468 U.S. 364 (1984), and then channeling upheld in Action for Children's Television, 58 F.3d 654 (D.C. Cir. 1995)).

not, as Smolla suggests, lead to program by program review.[61] As a practical matter, if the FCC adopts a standard and defines core programming, it will signal to broadcasters that it is serious about enforcing the CTA, and broadcasters would better self regulate.[62] In most cases, the FCC will defer to the broadcasters good faith judgment as to whether a program meets the FCC's core definition. FCC intervention and program by program analysis would then only be necessary in the rare instance of outrageous claims made by broadcasters detected in license renewal review or brought to the FCC's attention by a Petition to Deny. However, outrageous claims would be unlikely, because all licensees would be on notice of what the CTA requires.

C. The Children's Television Act, And Its Enforcement Is Unquestionably Constitutional

Neither Smolla, nor any other Commenters challenge the constitutionality of the Children's Television Act itself.[63] Moreover, Smolla repeatedly recognizes that the CTA provides the FCC with "broad discretion, during the license renewal process,

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[61] Smolla at 8.

[62] See 1995 Comments of CME et al. at 9-17 (governmental pressure leads to an increase in educational programming for children).

[63] Commenters reiterate that the constitutionality of the CTA itself is not properly before the Commission. Significantly, no broadcaster has ever sought review of the constitutionality of the CTA. Moreover, the Commission cannot declare any part of the Communications Act unconstitutional. See Johnson v. Robison, 415 U.S. 361, 268 (1974); Meredith Corp. v. FCC, 809 F.2d 863, 872 (D.C. Cir. 1987). Only the Courts can do that, and really in this case, only the Supreme Court.

to review a station's commitment to educational and informational programming."[64] Furthermore, Smolla agrees that if the FCC determines that a station has not aired a sufficient amount of programming, the Commission may decline the station's renewal application. Yet, Smolla maintains that a regulation quantifying the amount of children's educational programming expected for renewal is unconstitutional.[65] In effect, he argues that the FCC may only establish a programming standard on an ad hoc, case-by- case basis. This position is inconsistent with the Act and established administrative law.[66] Smolla's recognition that the Act may be enforced by adjudication, contradicts his conclusion that it may not be enforced by rulemaking. The result of a denial of renewal, would be the establishment of a programming standard, holding henceforth that stations airing comparable amounts of programming would not have complied with the CTA. Thereafter, all stations would be on notice that similar amounts of educational programming were not sufficient.[67] Moreover, establishing a rule by rulemaking, rather than relying on a case

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[64] Smolla at 27-28, citing Markey. See Smolla at 12 ("the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve."). See also NAB at Attachment 1 (obligation to provide educational and information programming).

[65] Smolla at 6-7.

[66] SEC v. Chenery Corp., 332 U.S. 194 (1947) (agencies may decide whether to formulate policy by rulemaking or adjudication). See, e.g., Tearney v. NTSB, 868 F.2d 1451 (5th Cir. 1989); Quivira Mining Co. v. NRC, 866 F.2d 1246, 1261 (10th Cir. 1989).

[67] See 1994 Comments of CME et al. at 37-39.

by case approach, is fairer to broadcasters because it provides them with advance notice, greater clarity and more uniformity in enforcement.

Not only will establishing a rule provide broadcasters with guidance as to what is expected of them at license renewal, but it will similarly provide FCC staff with a benchmark to review renewal applications. Utilizing a standard to determine compliance with the CTA at license renewal is comparable to the FCC's use of guidelines to determine licensee compliance with the Equal Employment Opportunity rules.[68] In reviewing licensees for compliance with the EEO regulations, the Commission uses a two-step approach whereby if broadcasters comply with the FCC's EEO processing guidelines, they are automatically renewed. If, however, the initial evaluation indicates the licensee's record is unsatisfactory, the FCC investigates in areas that appear to be deficient.[69] Thus, a broadcaster's renewal application is not denied if it fails to comply with the EEO guideline. It is, however, subject to greater scrutiny to ensure the intent of the

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[68] 47 C.F.R. § 73.2080; See also Implementation of Commission's Equal Employment Opportunity Rules, Report, 9 FCC Rcd 6276, 6290 (1994)("1994 EEO Report"). In the first step of the process, the staff reviews, inter alia, the composition of the station's workforce as reported in its Annual Employment Reports. The staff then applies the FCC's processing guideline by comparing the composition of the station's employment profile with relevant labor force. Specifically, the processing guidelines require stations with eleven or more full-time employees meet the guidelines if the proportion of minority and female representation is at least 50 %of the relevant labor force for both overall and upper-level job categories. Id. at 6290-01, fn. 29.

[69] Id.

Act was met.

Unlike the EEO review, the CTA currently provides no benchmark. FCC staff in charge of implementing the CTA are faced with the challenge of assuring programming compliance without any quantitative guidelines or detailed programming criteria.[70] There is no formula for computing what a broadcaster must do to have a reasonable expectation that they will be renewed. Thus, how broadcaster are renewed is anyones best guess. To remedy this situation, Commenters strongly endorse the FCC's proposed specific quantitative requirements and strengthened definition. This will place broadcasters on notice of how much education programming they must provide and what type of programming counts toward fulfillment of the Act.[71]

In sum, adoption of the FCC proposals is consistent with the First Amendment. It will ensure children have reasonable access

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[70] Denise Mathews, Ph.D. and Maryl Neff, The Little Law That Couldn't: FCC Implementation of the Educational/Informational Programming Requirement of the Children's Television Act of 1990, Institute for Child Health Policy, Gainesville, Florida (1994) (Mathews & Neff). Barbara Kreisman, Chief of Video Service Division, stated in an interview that, "... one of the problems is the Act. . . the fact that you don't have a quantitative standard and you don't really have criteria to apply a qualitative standard... makes it hard for us to enforce, and we're sort of caught in the middle." Id. at 18.

[71] "[T]he Commission has never told broadcasters what it expects of them. This lack of guidance is unfair... [T]he lack of guidance makes the Children's Television Act an empty promise.... The FCC is trying to rectify this situation. We are struggling to write rules that give effect to the statute." Commissioner Susan Ness, Remarks before the Independent Educational Consultants Association, Putting Children First: The Rights of Children in the Information Age, at 4 (Nov. 9, 1995).

to educational programming, preserve the editorial discretion of broadcasters and enable the FCC staff to efficiently and fairly review licensees for compliance with the Act at renewal.

IV. "CORE PROGRAMMING" SHOULD INCLUDE ONLY PROGRAMMING THAT HAS EDUCATING AND INFORMING CHILDREN AS A SIGNIFICANT PURPOSE AND IS AIRED AFTER 7 A.M.

If the Commission adopts a quantitative standard, it is important to clearly define what programming will be counted toward fulfillment of that standard. Although not raised in the Notice, some Commenters imply that the definition of educational programming can be construed to include any programming that can be characterized in some way as "pro-social."[72] CME objects to such an interpretation of the CTA's definition of core programming. The intent of Congress was clear that programming that complies with the CTA is that which is specifically designed to educate and inform children. NAB quotes Senator Inouye and incorrectly suggests that he believed qualifying programming was not intended to be academic, instructional or even intellectual.[73] However, what Senator Inouye said was that "educational and informational needs encompass not only intellectual development but also the child's emotional and social development."[74] (emphasis) Commenters have always argued

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[72] ABC Comments at 18-19; CBS Comments at 8-9; NAB Comments at 19-20.

[73] NAB Comments at 19 (citing Inouye at 136 Cong. Rec. 10122 (July 19, 1990)).

[74] 136 Cong. Rec. 10121, 10122 (July 19, 1990) (statement of Sen. Inouye).

that educational programming can meet both of these needs.

Moreover, the Congressional record is replete with illustrations of programs which Congress considered examples of the kind of programming broadcasters should air to comply with the Act. Programs designed to teach children specific skills such as Mr. Rogers, Sesame Street, and the Electric Company were praised,[75] as were locally produced programs such as The Great Intergalactic Scientific Game Show and Action News for Kids.[76] Conversely, the legislative history criticized reliance on adult or family comedy, variety or dramatic programs, adult talk programs, and other non-child oriented programming.[77]

As further evidence that Congress did not intend programming that was only pro-social to qualify, it is instructive to look at how educational programming is defined in the section of the CTA that created the National Endowment for Children's Educational Television.[78] The Endowment was created to provide grants for the production and development of educational children's programming which would be aired on both public and commercial television stations.[79] The term "educational television

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[75] Senate Report at 5-6.

[76] Id. at 8. These are all programs of standard length, specifically designed to educate and inform children.

[77] Id.

[78] 47 U.S.C. § 394.

[79] 47 U.S.C. § 394(B). During the first two years after the production of an educational program it is to be made available only to public television licensees and permittees and noncommercial television licensees and permittees; thereafter it

programming for children" is defined in there as "any television program which is directed to an audience of children who are 16 years of age or younger and which is designed for the intellectual development of those children."[80] In the floor debate, Senator Hollings specified that educational programming under the Endowment should be "specifically designed to serve the educational, informational, and developmental needs of children, with the objective of improving intellectual skills and better preparing young viewers to learn by establishing a solid emotional and social foundation for intellectual advancement."[81] Since the Endowment and the educational programming requirements were enacted in the same bill, and both provisions describe educational programming, it is logical to conclude that the same definition of educational programming used in the Endowment provision was intended to apply to the programming requirement. Therefore, a program focusing on only social and emotional development does not fulfill the programming requirement under the CTA.

Furthermore, if the FCC permits purely pro-social programming to be counted toward the core requirement, experience

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can be made available to any commercial television licensee. Id.

[80] 47 U.S.C. § 394 (i)(1). One of the findings Congress made when establishing the Endowment was that children in the United States were lagging behind those in other countries in fundamental intellectual skills, including reading, writing, mathematics, science, and geography.

[81] 136 Cong. Rec. 10121, 10123 (July 19, 1990) (statement of Sen. Hollings).

shows that broadcasters will simply redefine their current programming in pro-social terms.[82] The O'Brien Study included with NAB's filing provides a recent example of broadcasters' willingness to broadly interpret the definition of educational programming to include almost anything.[83] In this study, O'Brien interviewed children and teachers regarding what they considered educational.[84] Many responded that almost every show had some educational value.[85]

Commenters do not deny that children can learn from many different sources.[86] However, it was purpose of the CTA to

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[82] Valerie Schulte, NAB Attorney, stated that broadcasters were told to "go ahead and list all that are arguably educational/informational to bolster your showing." Quoted in, Denise Matthews, Ph.D., Institute for Child Health Policy, and Maryl Neff, The Little Law that Couldn't: FCC Implementation of the Educational/Informational Programming Requirement of the Children's Television Act of 1990 at 21 (1994). As a result, "[The broadcasters] threw in everything including the kitchen sink". Id.

[83] See NAB Comments, Attachment 4 (citing Lynn O'Brien, Educational and Informational Children's Television Programming: New Perspectives From the Educational Community (Aug. 4, 1995)); See also A Report on Station Compliance With the Children's Television Act, center for Media Education and Institute for Public Representation, Georgetown University Law Center, (Sept. 29, 1992) at 6 (finding license renewal applications which contained descriptions of cartoons redefined in educational pro-social terms, including "Chip 'n Dale Rescue Rangers:" "The Rescue Rangers stop Cheddarhead Charlie from an evil plot. The rewards of team efforts are the focus of this episode.").

[84] Id.

[85] For example, one six year-old boy stated that ESPN's Sports Center is "kinda educational because it helps you learn about different sports, and points and scoring." Id. at 10.

[86] Indeed, children can learn from specifically designed educational programs that are entertaining.

require broadcasters to provide programs that are specifically designed to educate and inform. Programs that offer incidental educational benefits should not be counted toward the core programming requirement. Because pro-social has become a term of art allowing broadcasters to include almost any kind of programming vaguely beneficial to the social development of children, the Commission needs to clarify that the core programming definition does not include purely pro-social programming.

In addition, the Commission also should only count programming aired after 7 a.m. as core programming because about 97% of the child audience is not watching programming before 7 a.m.. The NAB's own survey indicates that about 3.1% of children ages 2 to 11 are watching television at 6 a.m. This numbers goes up only slightly, to approximately 6%, at 6:30 a.m.[87] Thus, at 6:00 a.m., less than a million of the over 38 million children ages 2-11 are watching television.[88] At 6:30 a.m., less than two million of the 38 million children are watching television.[89] But, even though broadcasters know that a small percentage of children are in the audience, they consistently air

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[87] See NAB Comments, Attachment 5, Chart. This information is consistent with other data present in this docket. See Notice of Proposed Rulemaking, MM Docket No. 93-48, at 5, n. 8 (citing Television Audience 1993, at 14, Nielsen Media Research, 1993).

[88] See August 1995 Nielsen Television Index; January 1995 Nielsen universe.

[89] Id.

about 20%[90] of their educational programming before 7 a.m.[91] The amount of programming aired at that early hour is not proportional to the child audience viewing at the time. Airing children's educational programming when children are not watching does not fulfill Congressional intent to increase educational programming for children.

V. THE AVAILABILITY OF OTHER SOURCES OF EDUCATIONAL CHILDREN'S OPPORTUNITIES IN THE VIDEO MARKETPLACE IS IRRELEVANT TO BROADCASTERS' OBLIGATION TO SERVE THE PUBLIC INTEREST AND DOES NOT OBVIATE THEIR RESPONSIBILITY UNDER THE ACT

NAB and CBS claim that the availability of children's educational activities and opportunities in the greater video marketplace, regardless of the programming offered for free on commercial broadcast stations, negate the need for quantitative

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[90] Commenters are using the figures cited by the NAB in its 1995 Survey. However, given the many infirmities present in the survey, commenters question whether this number is not even higher. Commenters suggest that the percentage of programming airing before 7 a.m. is probably more substantial because broadcasters may have included noneducational programming in their survey questionnaires. CME's research shows that in the top 20 television markets, 44% of all weekday "compliance shows" aired at 6:30 a.m. or earlier. See Patricia Aufderheide, Ph.D. and Kathryn Montgomery, Ph.D., The Impact of the Children's Television Act on the Broadcast Market (June 1994)(filed with the Commission in the 1994 En Banc Hearings).

[91] One example of a station that airs a substantial number of its educational and informational programming before 7 a.m. is KCAL in Los Angeles. Application for Consent to Transfer Control of Broadcast License Held by Capital Cities/ABC, Inc. to the Walt Disney Company, Petition to Deny, or in the Alternative, to Obtain a Social Contract, File No. BTC, BTCH, or BTCCT 950823KA-LI, Sept. 28, 1995. The schedule for the Fall 1995 season shows that the majority of the educational programming is being shown during the early hours of the morning. The Commission should strongly question why broadcasters are relegating educational programming to early morning hours where ratings will almost certainly be low.

standards.[92] They argue that all media, providing any form of educational fare, should be considered by the Commission in assessing the need for further regulatory action.[93] This is incorrect. The availability of children's educational opportunities on alternative media is irrelevant to fulfillment of a broadcaster's programming obligation under the Act.[94] Broadcasters offer this argument merely to obfuscate the issue of inadequate industry compliance.

The Act requires each broadcaster to air some educational children's television.[95] Only broadcasters, because of their status as public fiduciaries, have a public interest obligation.[96] Congress was aware of all of these alternative media

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[92] CBS Comments at 18-19, NAB Comments at 9.

[93] Id. The broadcasters have misconstrued Senator Inouye's floor remarks regarding the CTA. 136 Cong. Rec. 10121 (July 19, 1990) (statement of Senator Inouye). The Senator says "each broadcast licensee must demonstrate that it has provided the child audience with programming which serves its unique educational and informational needs. Under this legislation, the mix is left to the discretion of the broadcaster taking into account what other stations, including noncommercial ones, are doing in this important area." Senator Inouye's remarks did not invite broadcaster's to look at the greater video marketplace. Rather, he advised broadcasters to see what other broadcasters in their service area were doing.

[94] See e.g. ABC Comments at 8 (acknowledging that broadcasters still must fulfill their obligation even though this greater video marketplace exists).

[95] 47 U.S.C. § 303b (a)(2).

[96] See 136 Cong. Rec. 10121 (July 19, 1990)(statement of Sen. Inouye).
Recently, broadcasters have touted their public interest obligations in exchange for various concessions. For example, NAB successfully opposed the administration's effort to impose a

when the CTA was passed,[97] yet concluded "that the new marketplace for video programming does not obviate the public interest responsibility of individual broadcast licensees to serve the child audience."[98]

Not only are the alternatives irrelevant, but NAB and other Commenters overstate the availability and substitutability of the

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$ 5 billion spectrum usage fee on broadcasters by arguing that the fee would "change the landscape of communications policy" by eliminating broadcasters commitment to serve the public interest in exchange for free use of the spectrum. "Broadcasters have always supported that compact, [NAB President] Fritts says. This proposal, however, puts it at risk". K. McAvoy, Dingell May Be Set to Derail Onerous Spectrum Tax, Broadcasting and Cable, June 13, 1994, 42-43. Similarly, broadcasters argue they should be exempt from spectrum auctions because "there is a contract, we feel, with the Government that we're allowed to use that spectrum for the betterment of the community." Hearings on H.R. 707 before Subcomm. on Telecomm. and Finance of the House Comm. on Energy and Commerce, 103d Cong., 1st Sess. at 68 (Feb. 4, 1993)(statement of Edward O. Fritts). Furthermore, in the recent DAR allocation proceedings, NAB President Eddie Fritts explained to the FCC that "U.S. broadcasters, have always had a 'special role' and borne 'special obligations' in providing service to the American public: 'Television licensees are required to provide educational and informational children's programming.'" Letter from Edward O.Fritts to Chairman Hundt, Gen. Docket No. 90-357 (May 3, 1995) at 4, quoting Satellite DARS Allocation Order, 10 FCC Rcd 2310 (1995).

[97] For example, in Subcommittee hearings prior to the CTA's passage, Eddie Fritts, President of NAB, implored the Senate to "keep [the] video marketplace in mind as it examine[d] the pending legislation" Children's Television Act: Hearings on S.707 and S. 1215 Before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation of the United States Senate, 101st Cong., 1st Sess. 52, 54-55 (July 12, 1989) (statement of Edward O. Fritts, President, National Association of Broadcasters).

[98] House Report at 6. The House was aware of and commended the job that PBS was doing in the area of educational and informational children's programming, yet still felt the need to enforce the broadcasters' requirement through enactment of the CTA.

alternative sources for free commercial broadcast television. For example, NAB offers the KIDSNET Media Guide as documentation of the abundance of educational and informational programs available to children.[99] However, KIDSNET's eighty-six page guide contains a total of only six pages of offerings by the major networks; ABC and CBS's offerings fill only 2 1/2 pages each, and NBC fills less than one page. Cable offerings, radio offerings, CD-ROM, and on-line services comprised the majority of the listings in KIDSNET. Not only are these listings not all broadcast programming for children, but many are not even educational. Some offerings listed are still in the production phase, and many are not even programming at all, but interstitials and PSAs.[100] It appears as if there are more broadcast programming opportunities for children than there truly are, as the descriptions of these various offerings are given as much text as regularly scheduled programs.

Finally, these alternative sources are inaccessible to many children. CBS claims that ample opportunities exist in the "existing video marketplace" for interested parents and children to supplement any unmet demand for educational and informational programming.[101] (emphasis added). Yet, CBS fails to recognize

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[99] NAB Comments at 9, and Attachment 2.

[100] This is a similar to broadcasters current attempts to pad their station files with PSAs and Interstitials so the impression is given that there are a lot more substantive programs being aired than is the case.

[101] CBS Comments at 12.

that there are many interested parents who do not have the resources, both financial and technological, to provide their children with these alternatives. For parents to provide educational programming in-home using their VCR would require continuous round-trips to the video store, as well as financial expenditures for video rentals at an annual cost of nearly $1,000.[102] Similarly, basic cable service costs a family about $300 per year and is currently available in only two out of three homes.[103] The Internet and CD-ROM are unavailable to a majority of children as only about 30% of all homes even have computers, and only 10% have modems.[104] Moreover, with each of these technologies, cost and parental knowledge and involvement ensures that portions of the child audience will always be excluded from the opportunities that exist, most often it will be the children

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[102] Children's rentals are generally $1.50-$3.50 each. An hour a day of programming would cost about $17.50 per week, or over $900 per year. For purchase, videos cost about $15.00.

[103] About 64% of households have cable. Nielsen Media Research for CommerceNet, Wash. Post, Oct. 31, 1995, at A6. The yearly figure assumes a charge of approximately $26 per month, the average cable bill in the Washington, D.C. area.

[104] Access to the Internet requires ownership of a computer and a modem and use of CD-ROM requires ownership of a computer, and various very expensive software. Both require some degree of technical knowledge, supervision by, and considerable cost to a parent. Further, Internet users are not representative of the general population. 25% of Web users have incomes in excess of $80,000. This income level represents only 10% of the general population. Nielsen Media Research for CommerceNet, Wash. Post, Oct. 31, 1995, at A6.

in less affluent households.[105] Broadcasters' public interest obligation requires that children have as free and as easily accessible educational programming as adults enjoy.

Broadcasters have made a social contract with all viewers and listeners, including children. It is not an option for them to shift their responsibility under the Act to parents or to alternative media providers. The issue in this proceeding is broadcasters' public service programming obligation under the CTA. The abundant marketplace argument set forth by NAB misrepresents broadcasters' obligations and is irrelevant. It is a smokescreen to obscure poor compliance by the broadcasting industry.

VI. COMMENTERS AND BROADCASTERS AGREE THAT THE COMMISSION SHOULD ADOPT MEASURES THAT FACILITATE IMPROVED ENFORCEMENT OF THE CTA

Broadcasters and these Commenters agree that existing Commission rules do not adequately enable the Commission, broadcasters, or the public to monitor broadcaster compliance with the CTA. The record in this proceeding clearly demonstrates that there is widespread dispute about which programs claimed by broadcasters actually meet the educational and informational

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[105] Commenters are concerned that given the cost and accessibility of these other technologies the gap between information haves and have nots could widen alarmingly, and between families with full access to these technologies, and those without such access. As a result, many children would fall further behind in education, be unable to compete in a highly selective job market, and be at risk for poverty in an increasingly polarized society. See generally U.S. Department of Commerce, Falling Through the Net: A Survey of the "Have Nots" in Rural and Urban America, (July, 1995).

needs of children. Commenters and broadcasters agree that the Commission can cure these problems by adopting reporting and other measures that will improve the kind of information being collected by the Commission to enforce compliance with the Act.

The major broadcast networks and NAB agree with Commenters that the Commission should provide standardized programming reporting forms that require broadcasters to provide more specific information about programming efforts for children.[106] Standardized reporting is needed because a review of the currently filed children's programming reports demonstrates that there is little consistency in the reporting practices adopted by broadcasters, thus making them difficult to review and analyze.[107] The problems resulting from this lack of consistency have led broadcasters and these Commenters to agree that the interests of broadcasters, the public and the Commission will be better served if the Commission adopts standardized children's programming reports.[108] Because of the consensus on this issue, the Commission should formulate specific reporting forms that require all broadcasters to provide complete and detailed information about the programs that qualify as core programming.[109]

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[106] See NBC Comments at 25; ABC Comments at 4; NAB Comments at 18-19, 21.

[107] See Kunkel & Goette at 2; NAB Comments at 18-19, 21, 25.

[108] See CBS Comments at 6; NBC Comments at 12-13; ABC Comments at 4; NAB Comments at 18-19, 21.

[109] See Comments of CME at 43.

The Commission should also adopt other measures that will aid monitoring of children's programming efforts. The major broadcast networks and these Commenters support measures such as placing children's programming reports in separate files at the station, designating a contact person at the station to be in charge of children's programming issues, and providing information about educational children's programming to listing services.[110] The widespread support for these measures demonstrates that the Commission can and should adopt them.

Finally, while commenters oppose the FCC's sponsorship proposal,[111] if it is considered further, the FCC should put out for public comment a more specific proposal elucidating how it would work, be enforced, credited and reported.

CONCLUSION

The Commission is presented in this proceeding with the opportunity to improve broadcaster compliance with the CTA, and thus increase the availability of educational and informational programming for children. Broadcasters will meet the educational and informational needs of children only when they are given explicit direction as to what the CTA requires. Therefore, these Commenters believe that the FCC should adopt a specific quantitative programming standard, a clarified definition of what constitutes educational programming, and enhanced monitoring

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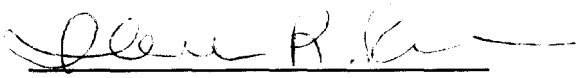
[110] See CBS Comments at 7; NBC Comments at 15; ABC Comments at 11.

[111] See Comments of CME et al. at 48, 51.

measures.



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November 13, 1995

Kathryn Montgomery, Pd.D.
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Dear Dr. Montgomery,

I have closely examined the second NAB report, The 1990 Children's Television Act: A Second Look on its Impact. On the whole, this self-report of the amount of educational and informational programming on broadcast television attempted to improve upon the previous research only by increasing the number of stations responding to the survey. None of the other problematic issues of the first study were addressed. Consequently, this study remains conceptually and methodologically flawed.

These self-reports by broadcasters show that the amount of educational and informational programming broadcast by the average commercial station increased from 3.75 hours in the Fall of 1993 to slightly more than four hours in the Fall of 1994. Overall, the broadcasters conclude that the Fall of 1994 had 100% more educational/informational programming (self defined) than programming broadcast in the Fall of 1990. There is, however, no test to determine if this difference is statistically significant. The stations also report that more than 80% of the programs began after 7am (15.8% began between 6:00 A.M. and 7:00 A.M.). As in the first study, the increases were found for both network affiliates and independent stations as well as stations in all market sizes.

Overall the NAB evaluation of the impact of the Children's Television Viewing Act concluded that the industry's response to the Children's Television Viewing Act has been positive in that there has been a substantial increase in the amount of educational and informational programming for children.

This study, as the preceding one, is seriously flawed and cannot be used to document appropriate compliance with the stipulations of the Children's Television Viewing Act. In addition, as the broadcasters have not addressed the very obvious